LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 17 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

JOHN P. JEHU
Associate Counsel
State Education Department
State Education Building
Albany, New York 12224
Attorney for Appellees

ROBERT D. STONE
Counsel and Deputy Commissioner
of Education for Legal Affairs
State Education Department
State Education Building
Albany, New York 12224

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Question Presented	1
Relevant Constitutional and Statutory Provisions of New York:	
New York Education Law, Section 2012	2
New York Education Law, Section 2603	3
New York State Constitution:	
Article II, Section 1	4
Article VIII, Section 4	4
Article VIII, Section 10	5
Article XI, Section 1	4
Background Facts	6
The Question Presented is Unsubstantial	13
Summary of Argument	14
Point I. The decision below, holding the complaint to be unsubstantial, is clearly correct	14
A. Appellant can have no possible legal interest in the operations of this school district and cannot show any injury	15
B. Section 2012 is purely a matter of State concern and violates no provision of the United States Constitution	19
Point II. No previous decision of this Court supports appellant's claim—in fact previous decisions of this Court have foreclosed the existence of a substantial question	31
A. There is a vast difference between a vote relating to a general governmental unit and the extremely limited vote under Section 2012	35
B. Section 2012 is based on a sound rationale intimately connected with, and essential for, the	

PAGE

operation of the affected part of the State school system 38

C. Questions relating to the wisdom of Section 2012 should be left to the political processes which are adequate, available and actually in progress 40

D. The frivolity of the complaint is highlighted by the contrast between appellant's complete lack of injury and the most serious damage that the extraordinary remedy of injunction here asked for, would do to the affected part of the New York school system, if granted 42

Conclusion 43

The complaint herein is wholly without substance 43

Appendix A:

Copy of Chapter 730, Laws of 1968, New York State, amending Education Law, Section 2012 45

Appendix B:

Copy of veto memorandum of Governor Dewey relating to S. I. 811 and 1835, 1953 46

Appendix C:

Copy of page 16, New York Law Journal of March 15, 1965, containing decision of New York Court of Appeals in *Turco v. Union Free School District,* dismissing appeal for lack of a substantial constitutional question 47

TABLE OF CASES.

Allied Stores, etc. v. Bowers, 358 U. S. 522 22
American Sugar Ref. Company v. Louisiana, 179 U. S. 889 22
Avery v. Midland County, ____ U. S. ____, 88 S. Ct. 1114 32
Baker v. Carr, 369 U. S. 186, 204 .....16, 32
Barrows v. Jackson, 346 U. S. 249 16
Berge v. Hollister, 275 App. Div. 852, 853 25
Blaikie v. Power, 13 N. Y. 2d 134, 144 .....25, 29

PAGE

Blue & Gold Stamps, etc. v. Sobieski, 190 F. Supp. 133, 136, 137 21
Brown v. Board of Education, 347 U. S. 483 31
Brown-Forman v. Kent, 217 U. S. 563, 573 22
Bullock v. Cooley, 225 N. Y. 566 25
California v. Railroad, 149 U. S. 308, 314 41
Carrington v. Rash, 380 U. S. 89 ..... 32, 34, 42
Cole, *et al.* v. Norborne Land Drainage District, 270 U. S. 45 23
Covington v. Kentucky, 173 U. S. 231 23
Cumming v. Richmond County Board of Education, 175 U. S. 528 20
Doremus v. Board of Education, 342 U. S. 429, 432, 433 ..... 16, 38, 41
Dove v. Parham, 181 F. Supp. 504, affirmed 282 F. 2d 256 19
Ex parte Yarbrough, 110 U. S. 651, 663-665 24
Flast v. Cohen, ____ U. S. ____, 20 L. Ed. 2d 947 16
Frank v. Maryland, 359 U. S. 360, 370, 371 ..... 28, 30
Gomillion, *et al.* v. Lightfoot, 364 U. S. 339 31
Gong Lum v. Rice, 275 U. S. 78 20
Gray v. Sanders, 372 U. S. 368, 379 23
Green v. Frazier, 253 U. S. 233, 239 22
Harper v. Virginia Board of Elections, 383 U. S. 663 ..... 33, 35, 38
Highland Falls Dairy v. Agnew, 300 U. S. 608, 612 .. 19
Hunter v. Pittsburgh, 207 U. S. 161, 177-179 21
Jackman v. Rosenbaum, 260 U. S. 22, 31 28
Janowski v. Parsons and Johnson v. Parsons, 207 Misc. 107, affirmed 285 App. Div. 601 25
Johnson v. City of New York, 274 N. Y. 411, 419 25
Kelly v. Pittsburgh, 104 U. S. 78 23
Kiernan v. Portland, 223 U. S. 151, 164 22
Kies v. Lowery, 199 U. S. 233 23
Landes v. Town of North Hempstead, 20 N. Y. 2d 417.. 29
Lanza v. Wagner, 11 N. Y. 2d 317, 326, app. dis. 371 U. S. 74, cert. den. 371 U. S. 901 ..... 25, 26
Laramie County v. Albany County, 92 U. S. 307, 312 .. 22
Lassiter v. Northampton County Board of Elections, 360 U. S. 45, 50, 51 23
McCabe v. Atchison T & SF Railroad Co., 235 U. S. 151, 162-164 16
McGowan v. Maryland, 366 U. S. 420, 425, 426 21
McPherson v. Blacker, 146 U. S. 1, 39 24

PAGE

McSwain v. County Board of Education, 104 F. Supp. 861, 869 20
Mabry v. Davis, 380 U. S. 251 34
Mason v. Missouri, 179 U. S. 328, 335 24
Matter of Bethlehem Union Free School District v. Wilson, 303 N. Y. 107, 114 25
Matter of Carrick, 183 App. Div. 916 25
Matter of Gage, 141 N. Y. 112 24
Matter of Schreiner v. Allen, 13 A. D. 2d 871, 872, 10 N. Y. 2d 707 27
Morgan v. Katzenback, 384 U. S. 641 34
Mount Pleasant v. Beckwith, 100 U. S. 514 23
Newton v. Commissioners, 100 U. S. 548 23
O'Neill v. Leamer, 239 U. S. 244 22
Paddell v. City of New York, 211 U. S. 446, 448 28
Pawhuska v. Pawhuska Oil Company, 250 U. S. 394 .. 22
People *ex rel.* Williams v. Dayton, 55 N. Y. 367, 378 .. 28
Pope v. Williams, 193 U. S. 621, 633 24
Reynolds v. Sims, 377 U. S. 533, 667 .....32, 33, 42
Risty v. Railroad, 270 U. S. 378, 390 22
Sailors v. Board of Education, 387 U. S. 105 ....34, 35, 37
Smith v. Allwright, 321 U. S. 649, 661-662 24
Spitzer v. Village of Fulton, 172 N. Y. 285, 286, 289, 290 .....24, 25, 28, 29, 30, 39
State Board v. Jackson, 283 U. S. 527, 537 22
State Tax Comm. v. Barnes, 14 Misc. 2d 311, 314 ....25, 27
Stebbins v. Riley, 268 U. S. 137, 142 22
Stewart v. Kansas, 239 U. S. 14 22
Tilleston v. Ullman, 318 U. S. 44 16
Turco v. Union Free School District No. 4 of the Town of Hempstead, Nassau County, 43 Misc. 2d 367, affirmed 22 A. D. 2d 1018. Appeal dismissed by Court of Appeals for lack of substantial constitutional question, March 11, 1965, see Law Journal, March 15, 1965 (not officially reported) 24, 30
United States v. Classic, 313 U. S. 299, 315 24
United States v. Hamburg American Line, 239 U. S. 466, 475, 476 41
Village of Saratoga Springs v. Saratoga Gas, etc. Co., 191 N. Y. 123, 124 28
Walters, *et al.* v. City of Saint Louis, 347 U. S. 231 22
Worcester v. Street Railway Company, 196 U. S. 539 .. 33
Yick Wo v. Hopkins, 118 U. S. 356 33

IN THE

Supreme Court of the United States

October Term, 1968
No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Question Presented

Should not the District Court's decision and judgment be affirmed where the complaint does not present a substantial Federal question; where the matter is one left by the United States Constitution to the State, and no violation of any federally guaranteed rights and immunities is involved; where the State Courts have already determined a matter which, in the absence of such a violation of federally guaranteed rights is one purely of State law; where

the controversy involved is, furthermore, a political controversy resting properly within the ambit of the legislative function, and therefore not justiciable; and where, finally, previous decisions of the United States Supreme Court have foreclosed the existence of a substantial Federal question?

Statutes Involved

New York Education Law, Section 2012:

"Qualifications of voters at district meetings.

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States.

2. Twenty-one years of age.

3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

a. Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase *or is the spouse of one who leases, hires or is in possession under a contract of purchase*[1] of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as lodger or boarder shall not entitle such person to vote, or

b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

c. Not being the parent, has permanently residing with him a child of school age who shall have attended

[1] Matter in italics added by Laws of 1968, Chapter 730, effective June 16, 1968.

the district school for a period of at least eight weeks during the year preceding such meeting.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section."

New York Education Law § 2603:

(Relating to the 56 City School Districts of Cities with less than 125,000 inhabitants.)

Qualifications of Voters

A person shall be entitled to vote at a school election in a city school district who is:

1. A citizen of the United States.

2. Twenty-one years of age.

3. An inhabitant of the state for one year next preceding the election and for the last four months a resident of the county and for the last thirty days a resident of the school district in which he or she offers his or her vote. If a naturalized citizen, such person must, in addition to the foregoing provisions, have been naturalized at least ninety days prior to the election. In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English.

Where territory is added to a city school district by consolidation or alteration of boundaries pursuant to article thirty-one of this chapter, residence in the territory so added shall be and shall be deemed to be residence in the city school district for the purposes of this section.

Relevant State Constitutional Provisions

New York State Constitution, Article II, Section 1.

> "[Qualifications of voters.] Section 1. Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election.
>
> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; subsequent amendments approved by vote of the people November 2, 1943, November 6, 1945, November 6, 1951 and November 8, 1966.)"

New York State Constitution, Article XI, Section 1.

> "[Common schools.] Section 1. The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

New York State Constitution, Article VIII, Section 4.

> "§ 4. [Limitations on local indebtedness.]
>
> Except as otherwise provided in this constitution, no county, city, town, village or school district described in this section shall be allowed to contract indebtedness for any purpose or in any manner which, including existing indebtedness, shall exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, town, village or school district: . . .
>
> '(h) any school district which is coterminous with or partly within, or wholly within, a city having less than one hundred twenty-five thousand inhabitants accord-

ing to the latest federal census, for education purposes, five per centum; provided, however, that such limitation may be increased in relation to indebtedness for specified objects or purposes with (1) the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election, . . .' *The legislature shall prescribe by the law the qualifications for voting at any such election.*" (emphasis supplied.)

New York State Constitution, Article VIII, Section 10.

"§ 10. [Limitations on amount to be raised by real estate taxes for local purposes; exceptions.]

Hereafter, in any county, city, village or school district described in this section, the amount to be raised by tax on real estate in any fiscal year, . . . shall not exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, village or school district, . . .

(e) any school district which is coterminous with or partly within or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for school district purposes, one and one-quarter per centum; . . . The limitation herein imposed for any such school may be increased by the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election . . . *The legislature shall prescribe by law the qualifications for voting at any such election* . . ." (emphasis supplied.)

Background

Facts

I. Application of voting qualifications under Section 2012 of the Education Law in New York State School Districts.

1. General Information.

The Constitutional basis for school district organization in the State of New York is found in section 1 of Article XI of the State Constitution which reads as follows:

> "The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated."

In pursuance of this Constitutional mandate the New York State Legislature, through the Education Law, has provided for such a system of free common schools.

All territory in the State (with the exception of certain Indian reservations and areas over which the State has formally ceded jurisdiction to the United States of America) is located in school districts.

The school district system was established in 1812 and has developed through various types of mergers from a total of over 12,000 school districts to a situation where (as of July 1, 1967) there are only 853 school districts in existence. While originally common school districts were subdivisions of towns, it is rare indeed today to find a school district coterminous with a municipality, except for some city school districts including the so-called "Big 6" city school districts (New York, Buffalo, Rochester, Syracuse, Yonkers and Albany).

In fact well over one-half of the New York State school districts are today located in more than one county with many districts covering territory in three and four counties.

There are five types of school districts in existence in this State: There are 128 common school districts (which may not operate a high school) of which number only 39 operate any school at all. There are 169 union free school districts of which two operate no school at all and 38 operate only elementary schools. There are 490 central school districts of which one operates only elementary schools. There are four central high school districts and finally, there are 62 city school districts of which six are fiscally dependent on the cities involved, while 56 city school districts are fiscally independent and levy their own taxes. Of the city school districts, ten have appointed school boards: four of the "Big 6" and, among the 56 smaller city school districts: Binghamton, New Rochelle, Plattsburgh, Rensselaer and Watervliet.

2. Voting qualifications in school districts.

a. In the so-called "Big 6" city school districts no qualified voter of the school district has the right to vote on any school district matter of any kind. In two of these six districts however boards of education are elected at the general election in November, along with elections for city offices (Rochester and Syracuse).

b. In the 56 smaller city school districts the qualified voters of such districts have a very limited right of participation in the Government and affairs of the city school district. The voting qualifications for these districts are found in Education Law Section 2603 and as of

the date of the enactment of this section in 1950, were the same as voting qualifications in the general elections in November. Since 1966 however when the State Constitution was amended so as to substitute the requirement of three months residence both in the State and in the county, city or village for the former requirement of State residence of one year, county, city or village residence of four months and 30 days residence in the election district, the voting qualifications of Section 2603 no longer are identical with the voting qualifications in the general elections. A bill was introduced in the 1968 session of the New York Legislature to correct this discrepancy, but failed of passage in the Senate, having passed the Assembly on March 19 (S. 4159; A. 6209).

As indicated, the voters of these city school districts are allowed to vote on the election of members of the board of education only in the 51 such districts where the board is elected. In five of these districts the board is appointed by the city authorities.

In none of these 56 city school districts are the voters allowed to vote on a school district budget, the purchase or sale of school buildings, the construction thereof and on most other matters which the voters of school districts outside of cities are permitted to vote on. In addition to election of board members, the franchise here extends only to a vote on approval of bond resolutions exceeding five, ten or fifteen year maturities respectively, depending in part on whether or not the board is elected; an increase in the constitutional tax limitation from 1¼% to 1½%, from 1½% to 1¾% or from 1¾% to 2% respectively; on bond issues by which the constitutional debt limitation

would be exceeded for a specific purpose; and on the establishment of a school-district-supported public library.[2]

c. The voting qualifications of section 2012 of the Education Law, here under attack, are applicable only in the 128 common school districts, 169 union free school districts, 4 central high school districts and 490 central school districts, *all of which together comprise less than one-third of the population of the State of New York.*

The franchise is here limited to *school patrons i.e.* to those groups of residents who have a direct interest in the administration of the respective local school systems, because they are either directly concerned as parents of pupils attending the public schools in question, or are directly assessed for real estate taxes as owners (or indirectly as renters) of real estate taxable for school purposes and thus carry a major share of the burden of payment for the services provided by the school district.

It should be noted here that payment of the tax is not required as a part of these voting qualifications. If the parent of the record owner, for instance, actually pays the tax, it is nevertheless the record owner who by virtue of the assessment becomes to that extent a qualified voter. Likewise where a special school district meeting or election is held prior to the tax levy, such assessed person nevertheless is a qualified voter and entitled to vote at such meeting or election. Tax delinquents, further, do not lose the franchise until such time as title changes, through tax sale or otherwise.

---

[2] School districts are only one type of unit that establishes and supports public libraries in New York. It is probable that municipally established and supported public libraries outnumber those related to school districts. In municipality connected public libraries the voters of the municipalities do not exercise the franchise.

d. It must here be noted further that *even where section 2012 is applicable, the great bulk of the school budget is withdrawn from the powers of the qualified voters to determine.* Education Law sections 2023 and 2024 provide that when the qualified voters of the district fail or refuse to appropriate the moneys necessary, in the opinion of the board of education, for teacher salaries and a group of items known as "ordinary contingent expenses," the board of education nevertheless may raise the necessary taxes for such purposes. These two items generally comprise from 75 to 90% of the amounts of the annual school district budgets. *Hence the power of the qualified voters to determine budget appropriations is thus limited to between 10 and 25% of such budgets.*

e. It is pertinent at this point to note briefly that the operations of local school districts are basically financed from two sources: first from a school tax on real estate which is set by the local school board; second from state aid which is paid in accordance with a formula set by the State Legislature. Increasingly now, school districts also receive Federal aid in accordance with standards set by Congress and the regulations of the Department of Health, Education and Welfare. Federal aid is categorical, while state aid is general aid. The tax rate is set by the school board by deducting from the annual appropriation the amounts of state and federal aid and levying a tax for the difference. It may here be added that on a statewide basis, state aid *derived from a number of sources* accounts for about 45% of the cost of operating the state's 853 school districts—also of course there are wide local variations from this norm, the wealthier districts, generally speaking, receiving less state aid than the poorer ones under an equalization principle set by the Legislature.

II. Plaintiff is not a qualified voter.

Plaintiff is a bachelor, without children, living in his parent's home, and rents no real property subject to school tax. He is therefore not a school patron and the operations of the school district in which he lives can have no possible effect whatever on his rights. Not having a child in attendance at the local school or schools, he cannot be directly concerned with the operations thereof; since he pays no part of the local real estate tax burden, the operations of the local school system cannot possibly affect him financially.

To the extent that state aid or federal aid is paid to the district, such allocations of money are not determined by the local school district but by the New York State Legislature (administered by the New York State Education Department) and by the Congress of the United States (administered through the United States Commissioner of Education and, in large part, the New York State Education Department).

Plaintiff has the full franchise in relation to the vote for the members of the State Legislature, and therefore, the total amount of state aid paid by the state and in relation to the members of the Senate and House of Representatives, and therefore the total amount appropriated by Congress and allocated to New York State. The total amounts of state and federal aid are in no way affected by the operations of individual school districts. Consequently, the state and federal taxes payable by plaintiff are in no way affected by the operations of the local school district in which he resides. In some counties a non-real estate tax is levied which in whole or in part is paid by the county to the school districts located, in whole or in part, in that county. Again, the total amount of such tax

is not affected by the operations of individual school districts, and of course, plaintiff has the franchise relating to elective county officers.

He therefore cannot possibly have any actual interest in its operations and a non-existing interest cannot possibly enjoy constitutional protection.

III. Changes in school district voting qualifications through the political processes.

1. Much has been said in this litigation about the unreasonableness of allowing the spouse of a record owner of real property to vote in school district meetings and elections, but denying this right to the spouse of a person who rents, leases or is in possession under a purchase contract.

The New York State Legislature, during the course of this litigation, has remedied this situation by Laws of 1968, chapter 730, effective June 16, 1968.

Such spouses now are qualified to vote in school district meetings and elections.

2. In the smaller city school districts, the original 1917 enactment (chapter 791) provided substantially the same voting qualifications as does section 2012 here under attack. This provision was amended by Laws of 1921, chapter 384 and Laws of 1926, chapter 332 in various minor details.

When the laws applicable to this group of city school districts were generally revised in 1950 and 1952, the voting qualifications were completely changed so as to be identical with the then existing qualifications for general elections (see Laws of 1952, chapter 182). This identity continued to 1966 when the State Constitution was amend-

ed, creating a discrepancy between the two qualification provisions. As indicated above a bill was introduced to reconstitute conformity but failed of passage. The bill will be introduced again at the 1969 Session of the Legislature.

3. The proposed new State Constitution prepared by the 1967 Constitutional Convention would have eliminated any discrepancy in voting qualifications between general elections and *any* school district meetings and elections. For reasons presumably not connected with this subject, the proposal was rejected by the voters of the State.

4. The New York Legislature has established a Joint Legislative Committee for the revision and simplification of the New York State Education Law. This Committee is presently considering a similar change. If this proposal is finally adopted by the Committee, as is most likely, the proposal will be put in bill form and be submitted to the 1969 or 1970 legislative session. If the Legislature passes such an amendment, as it did pass the 1952 amendment relating to the 56 smaller city school districts, the issues of this litigation will of course become moot.

It is clear, therefore, that any statements below that the political processes are here unavailable or ineffective, are wholly untenable.

The Question Presented is Unsubstantial

Appellees herein move to affirm on the grounds that the question presented is so unsubstantial as not to need further argument.

Summary of Argument

I. The District Court properly held the complaint to be unsubstantial.

A. Appellant has sustained no injury whatsoever.

B. The statute in question is purely of State concern, its Constitutionality has been upheld by the State courts and it violates no Federally protected right.

II. No decision of this Court supports appellant.

A. A New York School District is not a multi-purpose, or general, governmental unit, but purely administrative and with a very limited specialized scope.

B. The statute is well within the ambit of permissible State action, closely and rationally connected with its purpose.

C. The political processes are adequate, available to appellant, and actually in progress.

D. The prayer for relief, based, as it is, on a total absence of injury, is wholly disproportionate to the effect such relief, if granted, would have on the affected part of the school system.

POINT I

The Decision Below, holding the complaint to be unsubstantial, is clearly correct.

Chief Judge ZAVATT of the United States District Court for the Eastern District of New York held:

> ". . . plaintiff's claim so obviously without merit, that it can only be characterized as frivolous" (259 F. Supp. 164, 167).

Chief Judge LUMBARD of the United States Court of Appeals for the Second Circuit, dissenting at 379 F. 2d 495, stated:

> "There is no need for three judges to consider a claim *so patently without any merit*" (emphasis supplied).
>
> "Accordingly, I would affirm Judge ZAVATT's holding that the constitutional issues raised by plaintiff's complaint are unsubstantial . . ."

Ironically, Judge KAUFMAN, whose vote caused the convocation of the three-judge court, made it quite clear that he did not *"view appellant's claim as being meritorious."* It is thus submitted that Judge KAUFMAN also felt that the complaint was unsubstantial but, as a matter of *"elegantia juris"*[3] should be dismissed by three judges rather than by a single judge.

Judges MOORE and BARTELS in dismissing the complaint, obviously also found the same to be unsubstantial.

It is submitted, in the light of prior decisions of this Court and all applicable principles of law, that the question is wholly unsubstantial, and that the decision below is correct and needs no further argument.

A.

Appellant can have no possible legal interest in the operations of this school district and cannot show any injury whatever.

The salient fact here is that appellant has no spouse, has no children and neither owns nor rents any real property

[3] 379 F. 2d 491, 498.

assessed for school taxes; he does not have a school-age child living with him nor is he in possession of taxable real property under a purchase contract.

At the very outset therefore, it is submitted that appellant is in *no position to raise questions not applicable to him, i.e.,* to represent classes of persons other than his own (*Barrows* v. *Jackson,* 346 U. S. 249, 255; *Doremus* v. *Board of Education,* 342 U. S. 429, 432, 433; *Tilleston* v. *Ullman,* 318 U. S. 44; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 162-164). Hence, whether this rule be viewed as a constitutional limitation on the jurisdiction of the Court, or as the Court's own complementary rule of self-restraint, appellant must be limited to the facts directly applicable to him. Questions therefore relating to various types of parents, spouses (see Point II, C., *infra*), clergy, etc., are not before the Court at all.

As far as appellant and his own class is concerned however, it is axiomatic that he must have "*a personal stake in the outcome of the controversy*" (*Baker* v. *Carr,* 369 U. S. 186, 204; *Flast* v. *Cohen,* ____U. S. ____, 20 L. Ed. 2d 947). Appellees submit that appellant has no such "personal stake" whatever in this matter. Translated into the language of the rules of standing, which are so closely related to justiciability, appellant fails to establish the necessary dual nexus between the status he asserts and the claim to be adjudicated. For one thing, he is not injured, legally or otherwise, and secondly (see B. *infra*) there is no violation of a constitutional provision involved here.

Appellant can have no justiciable interest in the premises, because he has no actual or direct factual interest. *A non-existing interest can not be constitutionally protected.*

First, he has no child in school and therefore the manner of operation of the school district can not affect him. His alleged "interest" is purely theoretical, *and in no way different from his like "interest" in the operations of the schools in Mississippi or Chicago.* We are all tangentially affected by the quality of education in other districts, other states, and even other countries. This however does not entitle us to vote in these places. Appellant can have no greater actual interest in this school system than any non-resident of the district would have.

The "vague generalizations"[4] of peripheral matters referred to in the dissent below can not serve to change this fact.

Appellant, secondly, can not complain of any financial effect of the operations of this school district on his pocket-book. He has no financial stake therein. He pays no school tax, directly as owner or indirectly as renter.

Insofar as state aid payments to the district are concerned, appellant can vote on the election of members of the State Legislature which sets the formula on the basis of which state moneys flow into the school system and which determines the total amount so to be allocated. This total amount however is not affected by the operations of an individual school district.

The same is true of federal aid. Appellant can vote on the election of members of Congress which determines the formulae of allocation of federal funds to the states and the school districts therein and determines the total amount thereof, which again is not affected by the operations of this school district.

---

[4] 282 F. Supp. 70, 75.

In some counties in the state (on information and belief, only Erie County and Monroe County) a county non-property tax is levied which is paid to the school districts in the county. No such county tax exists however in Nassau County, where appellant resides. Hence the dissent below is in error on this point, as it is also in such statements as those which declare that "it is the county, towns and villages which share the responsibility for much of the expense attributable to school district activities" (school district operations are paid for from school district funds and, as indicated in the "background facts" above, school districts are only in very few instances coterminous with municipalities) and that "decisions reached by local school boards have an impact on the fiscal decisions of every level of government" (the *existence* of school districts, and the number and types of students therein, of course have such an impact, but not the administration thereof). In any event appellant can vote on the election of county officers and whatever county operations may be subject to referendum. In those counties where such non-property taxes exist, it is county government which makes these determinations.

Appellant's taxes other than the local school district real estate tax which he does not pay, are therefore in no way affected by the operations of the school district and his pocketbook can not therefore be affected by his ability to vote in school district meetings or elections or his disability so to do.

Appellant therefore is not injured in any way. It is submitted that the extraordinary remedy of an injunction against the enforcement of state law can be used only where grave and irreparable harm is involved. Where there is no injury at all, such an injunction can not be imposed.

Hence the judgment below should be affirmed and the appeal dismissed.

B.

Section 2012 is purely a matter of State concern and violates no provision of the United States Constitution.

1. The key consideration here is the fact that the present controversy involves solely the validity of a State statute providing for voting qualifications in certain *school district* meetings and elections in the State of New York. *Not involved* here is any question of voting qualifications governing election of members of Congress or of members of the State Legislature or the election to any State-wide office, or any multipurpose, or general government unit.

This Court has consistently held that, as stated in *Highland Falls Dairy* v. *Agnew*, 300 U. S. 608, 612:

> "How power shall be distributed by a State among its governmental organs is commonly, if not always, a question for the State itself."

The United States Constitution and laws *do not guarantee or secure to anybody the right to vote on school district matters:*

(a) Education is clearly one of the areas reserved to the States under the United States Constitution. Hence:

> "It is not the function of [the Federal] Court to make educational policy or to resolve conflicts in educational territory. Neither is it the function of the Court . . . . to substitute its judgment for that of the [State or local school authorities] . . . . All [the] Court can and should do is determine whether Federally protected rights . . . . were violated . . . ."
>
> *Dove* v. *Parham*, 181 F. Supp. 504 (affd. 282 F. 2d 256).

Unless a clear violation of Federally protected rights is involved, education is purely a State function.

Cumming v. *Richmond County Board of Education*, 175 U. S. 528;
Gong Lum v. *Rice*, 275 U. S. 78.

While it is axiomatic, of course, that the Fourteenth Amendment and Civil Rights legislation are the Federal safeguard against denial of equal protection of the laws and denial of due process, with respect to voting qualifications in any kind of election, including school elections, and with respect to various other aspects of the educational system, nevertheless it is well established that the education of the citizens within their States is a State and not a Federal function. It is equally well established that in this field:

> "any interference on the part of Federal authority with the management of such schools can not be justified *except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.*" (Emphasis supplied.)
>
> *McSwain* v. *County Board of Education*, 104 F. Supp. 861, 869.

(b) As indicated, since education is a matter reserved to the States, nothing in the United States Constitution or laws guarantees anybody the right to vote on local school district matters. School districts are subordinate instruments of the State, and the regulation by the State of its subordinate units is likewise a matter in which the Federal Courts may not interfere, according to a long line of decisions of this Court. Hence, likewise, the United States Constitution does not guarantee anybody the right to vote on matters affecting the internal management of villages or towns, water districts, fire districts, garbage districts, police dis-

tricts, lighting districts, local improvement districts and many others. All of these, including our school districts, are subordinate and often very minute geographical units through which the States carry on purely local administrative functions and which are subject completely to State control. Unless violations of racial equality or other Federally protected rights are involved, the State legislatures have complete control over any aspect of the internal management and administration of any of these subordinate units. *As to all these matters this Court has completely foreclosed the existence of any substantial Federal question.*

Hunter v. *Pittsburgh,* 207 U. S. 161, 177-179 and many cases cited there.

> "the Fourteenth Amendment permits these States a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislators are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."
>
> *McGowan* v. *Maryland,* 366 U. S. 420, 425, 426.

> "Constitutional doctrine permits selectivity in regulatory statutes, State or Federal . . . It is accepted constitutional doctrine that equal protection does not require identity of treatment, if there be reasonable ground for difference of policy."
>
> *Blue & Gold Stamps, etc.* v. *Sobieski,* 190 F. Supp. 133, 136, 137, and cases there cited.

> "Equal protection only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purposes for which the classification is made."

Walters et al. v. *City of St. Louis,* 347 U. S. 231. In *Green* v. *Frazier,* 253 U. S. 233, 239, this Court held that in relation to legislation, every presumption is in favor of validty "and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.". Legislative classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." (*Allied Stores, etc.* v. *Bowers,* 358 U. S. 522 and cases cited there.)

To the same effect:

Brown-Forman v. *Kent,* 217 U. S. 563, 573;
State Board v. *Jackson,* 283 U. S. 527, 537;
American Sugar Ref. Company v. *Louisiana,* 179 U. S. 889;
Stebbins v. *Riley,* 268 U. S. 137, 142.

"Such corporations are the mere creatures of the Legislative will; and inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified or diminished at any time, without their consent and even without notice. They are but subdivisions of the State, deriving even their existence from the Legislature."

Laramie County v. *Albany County,* 92 U. S. 307, 312.
Kiernan v. *Portland,* 223 U. S. 151, 164;
Pawhuska v. *Pawhuska Oil Company,* 250 U. S. 394;
Risty v. *Railroad,* 270 U. S. 378, 390;
Stewart v. *Kansas,* 239 U. S. 14.

A very apposite case arose in *O'Neill* v. *Leamer,* 239 U. S. 244. In this case the Nebraska Supreme Court had held (93 Nebraska 786, 789) against plaintiffs on their contention that it was not within the power of the legislature to

authorize a portion only of the property owners in the proposed district to vote on the establishment of the district. This Court said (page 248):

> *"the objection as to suffrage qualifications in connection with the organization and management of the district . . . is likewise wholly devoid of substance."*. (Emphasis supplied.)

To the same effect:

> *Kies* v. *Lowrey*, 199 U. S. 233;
> *Worcester* v. *Street Railway Company*, 196 U. S. 539, and the many cases cited there;
> *Covington* v. *Kentucky*, 173 U. S. 231;
> *Newton* v. *Commissioners*, 100 U. S. 548;
> *Mount Pleasant* v. *Beckwith*, 100 U. S. 514;
> *Kelly* v. *Pittsburgh*, 104 U. S. 78;
> *Cole et al.* v. *Norborne Land Drainage District*, 270 U. S. 45.

Neither the Constitution of the United States nor any decision of this Court denies or casts doubt upon the validity of a provision such as § 2012. The Federal Constitution does not deny to the States the right to make reasonable classifications and fix reasonable requirements for voting, and this Court so holds. *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959); *Gray* v. *Sanders*, 372 U. S. 368 (1963). As long as voter qualification is not a means or cloak for discrimination against one class or group, "States can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2" (Mr. Justice DOUGLAS in *Gray* v. *Sanders*, *supra*, 372 U. S. 368, 379).

In his opinion in the *Lassiter* case, writing for a unanimous Court, Mr. Justice DOUGLAS spelled out the authority

and latitude resting in the States to fix voter qualification (pp. 50, 51):

> "The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope* v. *Williams*, 193 U. S. 621, 633; *Mason* v. *Missouri*, 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns. . . . So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v. *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. . . . the right [to vote] protected 'refers to the right to vote as established by the laws and constitution of the State.' *McPherson* v. *Blacker*, 146 U. S. 1, 39.
>
> "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdictions."

2. *In this matter of purely state concern, the State Courts have already decided the question contrary to the contention of appellant.*

The precise question has been passed upon by the State Courts *including the Court of Appeals,* in *Turco* v. *Union Free School District No. 4 of the Town of Hempstead, Nassau County,* 43 Misc. 2d 367, affd. 22 A. D. 2d 1018, appeal to Court of Appeals dismissed for want of a substantial constitutional question, March 11, 1965 (see N. Y. Law Journal March 15, 1965—Appendix C—not officially reported).

The general principle or the precise question also has been recognized in:

Matter of Gage, 141 N. Y. 112;
Spitzer v. *Village of Fulton,* 172 N. Y. 286;

Johnson v. *City of New York,* 274 N. Y. 411;
Blaikie v. *Power,* 13 N. Y. 2d 134;
Berge v. *Hollister,* 275 App. Div. 852;
Jankowski v. *Parsons* and *Johnson* v. *Parsons,* 207 Misc. 107, affd. 285 App. Div. 601.
See also *State Tax Commission* v. *Barnes,* 14 Misc. 2d 311.

In 1963, the Court of Appeals held that Article II, § 1 of the *State Constitution* is limited in its application to elections involving state officers or state issues. *Matter of Blaikie* v. *Power,* 13 N. Y. 2d 134, 144 (concurring opinion of Judge BURKE). The precedent noted for this holding was *Spitzer* v. *Village of Fulton,* 172 N. Y. 285, 289 "cited with approval in" *Johnson* v. *City of New York,* 274 N. Y. 411, 419. (*Matter of Blaikie* v. *Power, ibid.*)

The statutory history in respect to voting at school district meetings which has continued parallel with the different voter qualifications in the State Constitution since 1826, constitutes legislative construction of that constitutional provision as not pertaining to school district voting. (*Berge* v. *Hollister,* 275 App. Div. 852, 853; and see *Matter of Carrick,* 183 App. Div. 916). Boards of Education need not be elected. *Johnson* v. *Parsons,* 207 Misc. 107, 112, affd. 285 App. Div. 601 (4th Dept., 1955); *Bullock* v. *Cooley,* 225 N. Y. 566 (1919).

This is necessarily so in the nature of school districts as part of the state system of education. *Lanza* v. *Wagner,* 11 N. Y. 2d 317. School districts are creations, pursuant to statute of the administrators of the state education system (*Matter of Bethlehem Union Free School District* v. *Wilson,* 303 N. Y. 107, 114 [1951]). They are not units having multiple governmental functions. They are limited

to the administration within their boundaries of the state school system of elementary and secondary schools.

The Constitution now declares in Article XI, § 1, that "the legislature shall provide for the maintenance and support of a system of free common schools." (*Cf. Lanza* v. *Wagner, supra,* 11 N. Y. 2d 317, 326 [1962], app. dis. 371 U. S. 74, cert. den. 371 U. S. 901). There is no provision in the Education article of the Constitution for school districts, nor for the manner in which they shall function. All this is left to the Legislature, which had provided for school districts and school district elections for 82 years before Article XI, § 1 was written into the Constitution in 1894.

The explicit recognition that Article II, § 1 does not apply to school district voting on financial matters even where such vote has been provided in the Constitution, has been in the Constitution itself since 1949. An amendment to Article VIII, the Local Finance article, in that year, made provision (§ 10) for voting on increase of real estate taxes in certain school districts, declaring: "The Legislature shall prescribe by law the qualifications for voting at any such election." In 1951, Article VIII, § 4 was amended in respect to limitations on local indebtedness. Provision was made for vote on increasing indebtedness in certain school districts again declaring: "The Legislature shall prescribe by law the qualifications for voting at such election."

To go back more than a century prior to 1949, qualifications to vote at school district meetings have been in the statutes since 1826 in essentials as they are now; unchanged in any major details since 1895. The provision for voter qualification has been in the Constitution since 1821. Since 1826—when property qualifications were omitted in the main from voter qualification in the Constitution—voter

qualification for school district meetings and voter qualification in the constitutional provision have been divergent. This continued divergence is practical and legislative construction of the constitutional provision on voter qualification as having no bearing on qualification to vote at school district meetings.[5] Both the Constitution and school district statutes have been revised over and over again this nearly century and a half. The people, constitutional conventions, and the Legislature, which has both initiated amendment of Article II, § 1 several times and has enacted revision of the school and education law numerous times, have obviously deemed the differences in voter requirements of the two entirely proper; obviously deemed the constitutional provision irrelevant to school district meetings;[6] and put the constitutional imprimatur in 1949 and 1951 on leaving qualification for voting provided in the Constitution in certain school districts on indebtedness and taxation, to be prescribed by the Legislature.

Apart from this direction in Article VIII of the Constitution itself, the long period of practical and legislative construction

> "is entitled to great [if not] controlling weight in its interpretation. It has almost the force of a judicial exposition (Story on Const., § 408), and, unless such legislation and practice is manifestly in violation of the words used, the greatest weight should be given to it in construing them. (Cooley Const. Lim., 67,

[5] There are also property qualifications for voting in Village Law § 41; Town Law § 84; General Municipal Law § 120-p, and other statutes.

[6] The validity of Education Law § 2012 is accepted by the Courts as premise for application of it. See, for example, *State Tax Commission* v. *Barnes, et al.*, 14 Misc. 2d 311, 314 (1958); *Matter of Schreiner* v. *Allen*, 13 A. D. 2d 871, 872 (3d Dept., 1961), 10 N. Y. 2d 707.

and cases cited.)" *People ex rel. Williams* v. *Dayton*, 55 N. Y. 367, 378 (1874).

The Court of Appeals so wrote in that case of a period of legislative interpretation far shorter than the century and a half now passed during which the constitutional provision for voter qualification has been construed by the enactment of statutes providing different voter requirements at school district meetings and municipal elections.

In 1908, the Court of Appeals said, in *Village of Saratoga Springs* v. *Saratoga Gas, etc. Co.*, 191 N. Y. 123, 124:

> "It is now one hundred and thirty years since the people of this state adopted their first Constitution. Since that time there have been four constitutional conventions, framing new Constitutions, whose work, in whole or part, has been adopted by the people, besides which some extensive amendments have been enacted in the method provided by the Constitution. The people have had ample opportunities to correct any misconception or misconstruction on the part of public officers, as to their powers, whether legislative, executive or judicial, and any exercise of power by the legislature, which for a long time has passed unchallenged or, if challenged, has been sustained by the courts, must be deemed to have been approved by the people, unless forbidden by subsequent constitutional provision."

This principle of legislative and practical construction is honored as well by this Court when the Constitution of the United States is invoked in a challenge to a State statute (*Frank* v. *Maryland*, 359 U. S. 360, 370, 371 [1959]; Mr. Justice Holmes writing for a unanimous Court both in *Paddell* v. *City of New York*, 211 U. S. 446, 448 [1908], and in *Jackman* v. *Rosenbaum*, 260 U. S. 22, 31 [1922]).

The rationale of the *Spitzer* opinion on the subject of the justification for the property qualification for voting

in the statute there before the Court, forcibly demonstrates the justification today for the voter qualification provisions of Education Law § 2012.[7]

Necessarily the ruling in the *Spitzer* case that Article II, § 1 applies only to State elections and issues would be unchanged by time and was, as has been said last reaffirmed by the Court of Appeals in 1963 in *Blaikie* v. *Power, supra,* 13 N. Y. 2d 134, 144.

There is no less cogency today for the Court's statement in its opinion as to the justification for property qualifications in village elections on monetary issues, than moved the Court when it wrote its now long accepted opinion.

Indeed the times and conditions of the present make the words of the *Spitzer* opinion thrice applicable to voting qualifications today at school district meetings; language such as (172 N. Y., at p. 290):

> "What better or more effective method of preventing such abuses [in debt contracting] and protecting such taxpayers could be devised than to restrict the right of voting upon propositions for borrowing money or for contracting debts, to the persons who are liable to be taxed for the payment of such debts? . . . . the established policy of this state has been to limit the right of suffrage as to the business or financial affairs of its various villages to the taxpayers of the munici-

[7] The decision of the N. Y. Court of Appeals in *Landes* v. *Town of North Hempstead* (20 N. Y. 2d 417), does not support appellant. It was merely another finding of lack of ". . . . reasonable relation . . . 'to the object sought to be accomplished by . . . . legislation' ". The paramount distinction, however, is that the decision dealt not with qualifications to vote, but with qualifications to hold public office. There is no reasonable relation between a man's ability to hold public office and the fact that he happens to hold title to real estate. In the cause at bar, it is school patronage and its attendant direct concern with and awareness of school problems that is the criterion.

> pality, and it has never been its policy to confide their financial affairs to the general voters therein."

In this day when education is so enormously costly, when the standards and quality of education bought at its high cost are of such concern, how reasonable and justified it is that those who vote the large sums to be spent and the large taxes to be paid, be the ones whom these costs and the education it buys most affect:—the parent (or one who stands as parent) of a school age child attending a district school, and the school district taxpayer (directly as home owner or indirectly as tenant).

As Mr. Justice FRANKFURTER said in *Frank* v. *Maryland, supra,* 359 U. S. 360, 371 (1958) of another type of legislation:

> "Nor is this a situation where a new body of knowledge displaces previous premises of action. There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history. On the contrary, the problems . . . have multiplied manifold, ..."

More today—not less—than when the *Spitzer* case was decided, it is reasonable and justified that financial issues should be resolved for the school district by the vote of those who have real and practical concern with, and awareness of, them, and not by those who have merely abstract or philosophical views thereon, and no contact with them.

Hence, the State Courts, in *Turco* v. *Union Free School District No. 4 of the Town of Hempstead,* properly found that there was no constitutional objection to Education Law § 2012, and its special voting qualifications; it is to be noted that the question of Constitutionality under the United States Constitution was, in that case, argued extensively as well.

It is respectfully submitted, therefore, that the State Courts having conclusively settled this matter of purely State concern, there is not, and there cannot be, any substantial federal question involved.

The judgment below, therefore, should be affirmed and the appeal dismissed.

POINT II

No previous decision of this Court supports appellant's claim—in fact previous decisions of this Court have foreclosed the existence of a substantial question.

The decisions, on which appellant seeks to base his claim of substantiality, do not support his claim.

1. *Brown and Gomillion*

Both of these cases dealt with racial discrimination which is not here involved. Hence they are irrelevant to the issues here presented.

a. *Brown* (347 U. S. 483) applies the Equal Protection Clause to school districts. Appellees wholly agree with the rule but deny its relevance absent invidious discrimination which is not here presented.

b. *Gomillion* (364 U. S. 339). This case also is not relevant. Section 2012 involves no racial discrimination either in the statute itself or in its application. Mr. Justice WHITTAKER's concurring opinion merely reaffirms *Brown,* as to the applicancy of the Fourteenth Amendment to subordinate political subdivisions of the state in cases of abuses of state power.

2. *Reynolds, Baker and Avery. All three of these are "dilution" cases, having nothing to do with voting qualifications and are wholly irrelevant.*

a. *Reynolds* (377 U. S. 533) and *Baker* (369 U. S. 186). Not only did these cases not involve subordinate governmental units of any kind, but they dealt solely with the weight of one vote as compared with another.

b. *Avery* (____ U. S. ____, 88 S. Ct. 1114). While this case applied Reynolds to a unit of local government, that unit nevertheless was a multi-purpose, or general, governmental unit as distinguished from a special purpose administrative unit of extremely limited scope, as here. The Court there clearly distinguished between administrative and legislative powers. It speaks of a unit possessing "general responsibility and power for local affairs" (the unit there governed such diverse areas as courthouses and jails, health, county contracts, roads, bridges, welfare, elections, county taxes, tax equalization procedures and county bonds).

The Court specifically stated at page 1121:

> "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that *units with general governmental powers over an entire geographic area* not be apportioned among single-member districts of substantially unequal populations" (emphasis supplied).

3. *Carrington, Harper, Morgan and Mabry.*

While these decisions deal with various aspects of voting qualifications, none of them deal with a special purpose administrative local unit of the narrowly limited scope here presented.

a. *Carrington* (380 U. S. 89). For one thing, this decision dealt with statewide elections rather than with

qualifications for a local limited special purpose administrative unit and is therefore not here applicable. More importantly however, the decision points out that reasonable classifications may be drawn by state legislatures limiting the franchise, but that the statute there in question had *no reasonable connection with its purpose.* "[T]he uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it" (page 681). The case does not support appellant's position.

b. *Harper* (383 U. S. 663). Here again the franchise was statewide and applicable to any and all elections, rather than limited to a local narrowly circumscribed administrative unit. In such a general statewide setting, governing all general elections, it was held that the affluence of a voter or the payment of a fee can not be made an electoral standard. The Equal Protection Clause, it was held "restrains the States from fixing voter qualifications *which invidiously discriminate*" (emphasis supplied). But references to *Yick Wo* (118 U. S. 356) and *Reynolds (supra)* as well as other references make it crystal clear that the Court was speaking of the *general franchise only* which "is preservative of other basic civil and political rights," is "preservative of all rights" (page 667). This is further demonstrated by the emphasis on the language quoted from *Reynolds:* "The Equal Protection Clause demands no less than substantially *equal state legislative representation* for all citizens of all places as well as of all races" (pages 667, 668, emphasis supplied).

Consequently, the passage on which appellant seeks to rely:

> "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn

which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment" (page 664) must be read in the light of its true meaning which clearly is limited to the *general franchise* and does not cover such local narrowly limited special purpose administrative units as in the cause at bar.

This decision therefore likewise does not support appellant's claim.

c. *Morgan* (384 U. S. 641). While this decision deals with voting qualifications, it again deals with the general franchise, rather than with the issue presented by the cause at bar. More importantly however, that decision deals with a specific and express enactment of Congress (and the Supremacy Clause) while no act of Congress is involved here.

d. *Mabry* (380 U. S. 251). What has been said about *Carrington* (*supra*, a) is equally applicable here.

4. *Sailors* (387 U. S. 105). *This case strongly supports appellees' position.*

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the Governor, by the Legislature, or by some other appointive means rather than by an election" (page 653).
>
> "Save and unless the state, county or municipal government runs afoul of a federally protected right, it has *vast leeway in the management of its internal affairs*" (emphasis supplied—page 654).
>
> ". . . the County Board of Education performs essentially administrative functions, and while they are important, they are not legislative in the classical sense" (page 655).
>
> "*At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine*

elective and appointive systems . . ." (emphasis supplied—page 655).

"Since [no election] was required *for these nonlegislative officers,* the principle of 'one man, one vote' has no relevancy" (emphasis supplied—page 655).

It must be emphasized that the Court *did not restate* the phrase from *Harper* referred to above (to the effect that where the State provides for the franchise, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment") in *Sailors.* The reason, it is submitted, is that that phrase relates to *general elections only,* and does not apply to local nonlegislative units (see 3b *supra*), in line with the language from *Sailors* referred to here.[8]

The Court merely said "If we assume, arguendo," but continued that even if such an assumption were to be made, it still would not apply to such narrowly limited special purpose administrative units as the present case involves.

It is submitted that *Sailors* most strongly supports appellees.

A.

There is a vast difference between a vote relating to a general governmental unit and the extremely limited vote under Section 2012.

1. As shown above (II.) the Court's characterization of the franchise being "preservative of other basic civil

[8] It must be noted that the Michigan statute in *Sailors,* referred to in fn 1 at page 106 (Mich Stat Ann § 15.3511) sets forth differing school district voting qualifications depending on the subject of the vote: If the vote relates to bonds or tax limits, only property owners or their spouses may vote (Michigan Constitution of 1963 Article 2 § 6 referred to in said § 15.3511).

and political rights," being "preservative of all rights" *(supra)*, can only have reference to the *general franchise*, *i.e.*, the franchise as it relates to general governmental functions on the State, city or county level.

Section 2012 on the contrary relates only to the administration of elementary and secondary schools which are closely governed by State law. It is further limited to school districts other than city school districts, *i.e.*, one-third of the population of the State, and it is finally limited in subject matter or scope of the vote, to from 10 to 30 per cent of the budgets of these districts, together with capital projects and the election of members of boards of education thereof. Some of these districts are minute geographical units.

Example I

A typical example of the extent of the franchise under Section 2012 follows:

In 169 of these districts (those not maintaining a high school) the most important question the qualified voters must decide, is whether to send their high school students to District A or District B for their high school education. He who has no child to be sent, can have no possible interest in this choice, legally or otherwise. Where there is a difference in the tuition charges between Districts A and B, of course, the real estate taxpayer who carries a large share of the cost will find his pocketbook affected and thus is properly included in the franchise. But where a person neither has a child involved nor is financially affected by such a choice, his lack of access to the franchise can cause no possible injury to him—nor does such an extremely limited administrative decision affect any other governmental function or unit. The limitation of

the franchise to those affected by such administrative decision is thus well within the powers of the State and can not possibly pose a constitutional problem.

Example II

In a district operating its own high school, the qualified voters, for instance, might vote on whether to add four classrooms to an existing high school building. If the vote is affirmative, it would require the board of education to advertise for bids, accept the lowest responsible bidder and proceed with construction. This can affect only two classes of persons: (1) those who have children attending the school building and who will either actually use the new classrooms or whose crowded classrooms will be relieved by the new facilities and (2) those persons who by virtue of assessment of their property carry a large share of the cost of the new classrooms, and find their pocketbooks affected. This use of the franchise, however, can not and does not affect the city, county, village, town, or any other governmental unit, nor has it any effect on the health, welfare, police, highway, or any other functions or services of any level of government.

2. As this Court stated in *Sailors*, such a nonlegislative area is well within the proper sphere of state legislation which may "combine elective and appointive systems" (page 655). New York has done just that. In the so-called "Big Six" districts, four boards of education are appointed by city authorities and no one votes on school matters at all. In five of the smaller 56 city school districts, the board of education is likewise appointed by city authorities, while in all 56 such districts the franchise is vastly limited in scope. In the districts subject to Section 2012 other limitations are involved, including the limita-

tion on voting qualifications. It is submitted that all these purely administrative details are properly left to state legislation without in any way violating the Equal Protection Clause.

If the phrase from *Harper,* referred to above, is to be taken as the ground rule for such administrative details, it would seem to follow that the scope of the franchise, *i.e.,* matters open to determination by the voters, also could not be limited in any way.

B.

Section 2012 is based on a sound rationale intimately connected with, and essential for, the operation of the affected part of the State School System.

As residence is a reasonable limitation on the qualification to vote in most if not all elections, so a limitation of the right to vote in local school district matters *to the patrons of such local schools,* is a distinction reasonably related to the purpose to be achieved.[9] Such purpose is:

1. To make sure that only those persons vote who either actually use the administrative services involved, or those who are *assessed* for payment of such services (actual payment of a tax is not required under New York State Law to qualify for the vote). The public school sys-

[9] *Cf. Doremus* (342 U. S. 429), where Mr. Justice DOUGLAS, in a dissent joined by Justices REED and BURTON, stated (p. 435):

> "There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them."

Emphasis on the rights of parents may be found in the following sentences from the opinions of the Court (pp. 432, 433):

> "However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was taken to this Court. Obviously no decision we could render now would protect any rights she may once have had . . ."

tem is too vital a tool in the life of our body politic, to let its administration be influenced by people who have no possible actual and practical interest in, or concern or contact with the same—whose interest can be no different from the interest of a non-resident of the school district involved.

The importance of education in the life of our States and Nation can not be overstated. It is precisely for that reason that this State legislation is designed to leave decisions in this vital area to those most directly affected by the operations of the education system, those having the greatest concern with and awareness of its needs and problems. Even at that, the battle for good education is a most difficult one and must continuously overcome a multitude of obstacles. In areas, for instance, where lakes, rivers or beaches bring in summer homes, it has traditionally been difficult to keep out persons who, while owners of such homes and hence taxpayers, are nevertheless not residents but attempt to vote so as to keep school taxes low. In other districts where there are more taxpayers than parents, it has often been next to impossible to provide the financial basis for excellence in education—and yet, those persons who directly pay a large share of the cost thereof, can not and should not be excluded from the franchise. The New York Legislature over the many decades, has consistently felt that it is undesirable in such an often precarious balance of interests to open the door to those whose interest in such excellence can be but theoretical. The same reasons that support limitation of the franchise to residents, apply with equal force to the limitations of Section 2012 (see *Spitzer, supra*).

2. The second rationale for Section 2012 is to make sure that party political considerations stay out of the school

system. The difference in voting qualifications for these school districts constitutes the first line of defense against encroachment of party political procedures and considerations. If this were to be changed, the next step, inevitably, would be attempts to save the expense of the school vote taking place at a time other than the general elections, and to seek legislation to have such vote take place at the time of and as a part of the general elections. This in turn would throw the school system into the party political cauldron, contrary to a basic principle existing in the State from the beginning of school district organization in 1812, *and which has been highly effective in terms of the quality of the State Education System.*[10]

C.

Questions relating to the wisdom of Section 2012 should be left to the political processes which are adequate, available and actually in progress.

The detailed administration of education is clearly a matter of State concern, does not offend the United States Constitution in any way and therefore should be left to the regular political processes of the State.[11]

---

[10] When the voting qualifications for the smaller 56 city school districts were changed from those of § 2012 to those of § 2603 (by L. 1952, ch. 182), almost immediately several bills were introduced to change the date of city school district elections to the date and time of the general elections in November. Three of these bills reached the Governor's desk and were vetoed (S. I. 2880 of 1952 and S. I. 811 and S. I. 1835 of 1953, the latter two with memorandum which is reproduced as Appendix B). So far such attempts have been successfully met.

[11] It is pertinent to note here that, *even on the federal level,* changes in voting qualification, have traditionally and properly been left to the political processes: the inclusion of women in the suffrage was effected by Constitutional Amendment rather than by the Judiciary, as was the similar inclusion of the Negro.

As a matter of fact, the very question here presented was, and is presently, under consideration in three areas:

1. The New York State Constitutional Convention of 1967 proposed a new State Constitution which was rejected by the voters of the State on November 7, 1967. Included in this proposed Constitution was Article II, Sections 1 and 2 dealing with Suffrage. Had this Constitution been adopted the question before the Court would have become moot (*Doremus* v. *Board of Education,* 342 U. S. 429, 432, 433; *United States* v. *Hamburg American Line,* 239 U. S. 466, 475, 476; *California* v. *Railroad,* 149 U. S. 308, 314), as the provisions of this Article required the elimination of the Section 2012 special voting qualifications.

2. As pointed out in item III. of "Background Facts," the State Legislature has already acted on a part of Section 2012 which appellant and the dissent below criticize. Laws of 1968, Chapter 730, effective June 16, 1968, add the spouses of a renter, etc., to the school patrons qualified to vote (see Appendix).

3. A Joint Legislative Committee is presently working on a revision and simplification of the New York State Education Law and is considering elimination of § 2012, which if finally adopted by the committee, will then be submitted to the State Legislature, so that even though the proposed Constitution was defeated this question will then come before the State Legislature for action. If such action is taken, the question will become moot.

There is thus no reason for the Federal Courts to intervene in a matter of purely State concern which is even now under consideration through the State's political processes.

Such processes are adequate, available to appellant and in fact actually in progress.

Appellant has the full franchise as it relates to the election of State legislators. Thus the political processes which can change the provisions of Section 2012 are completely open to him. This clearly distinguishes the cause at bar from *Reynolds, Carrington* and other cases where the dilution or disfranchisement diminished or denied access to the political processes.

It is submitted that for this reason also the judgment below must be affirmed.

D.

The frivolity of the complaint is highlighted by the contrast between appellant's complete lack of injury and the most serious damage that the extraordinary remedy of injunction here asked for, would do to the affected part of the New York State School System, if granted.

Appellant seeks the extraordinary remedy of injunction against the enforcement of a state statute governing the voting qualifications in a numerically large number of school districts, potentially involving several million persons. If the injunction were to be granted, since the Federal Courts can not legislate, especially in an area of State law, and since the New York State Election Law is not applicable in New York school districts, there can not be any substitute provision of law governing voting qualifications in these school districts in such case, until such time thereafter as the New York Legislature can and does take action. For various reasons this could be a protracted period of time. During such period no school district meetings or elections could be held, no matter how urgent a need therefor might arise in various areas of the state, in relation to school building construction, filling vacancies on school boards and other matters.

When the non-existing interest of appellant and the total lack of injury to him is compared with that grave result, the insubstantiality, to the point of frivolity,[12] of his claim becomes readily apparent.

CONCLUSION

The complaint herein is wholly without substance.

For all the foregoing reasons it is respectfully submitted that the appellant presents no substantial question for the decision of this Court, that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

JOHN P. JEHU
Associate Counsel
State Education Department
State Education Building
Albany, New York 12224
Attorney for Appellees

ROBERT D. STONE
Counsel and Deputy Commissioner of Education
for Legal Affairs
State Education Department
State Education Building
Albany, New York 12224

[12] 259 F. Supp. 164, 167.